PP

v.

MUSLIM AHMAD

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPEAL NO: 42S-50-2011]
28 AUGUST 2012

CRIMINAL PROCEDURE: *Defence - Alibi or denial - Pre-trial notice - Service of notice of alibi - Trial postponed to another date - Whether fresh notice of alibi to be served - Whether substantial compliance with notice of alibi sufficient to support defence - Criminal Procedure Code, s. 402A - Whether complied with*

EVIDENCE: *Expert evidence - Establishing expertise, necessity of - Whether necessary to show expertise and experience of witness - Whether adducing of experience sufficient to establish expertise - Evidence Act 1950, s. 45*

The respondent was charged before the Sessions Court for three offences under s. 233(1)(a) of the Communications and Multimedia Act 1998 for posting offensive comments against the Perak state government's official portal on 7 February 2009 and 8 February 2009. At the close of the prosecution's case, the Sessions Court Judge acquitted and discharged the defendant on all three charges. On appeal, the High Court reversed the decision and directed that the defence be called in respect of all the charges. The respondent's defence was that he had not posted the said offensive comments and denied using his computer to send the said comments. The respondent testified that he was at his factory on the said dates. In support of his defence, he called upon two employees ('DW2') and ('DW3') from his factory to confirm that he had been at work during the said dates. The prosecution contended that the respondent's alibi defence was defective for non-compliance with s. 402A(1) of the Criminal Procedure Code ('CPC'). The respondent served the prosecution with the notice of alibi dated 28 October 2009 on 6 November 2009 *ie*, three days before the commencement of the initial trial which was scheduled from 9 November 2009 till 13 November 2009. However, the trial was postponed to 14 June 2010 till 25 June 2010. The prosecution contended that a fresh notice was

not served before the commencement of the new date. The prosecution further contended that there was non-compliance of s. 402A(2) of the CPC as to the particulars of the place where the accused claimed to be at the time of commission of the offence and the names and addresses of the witnesses called to establish that the defences were not provided. The Sessions Court Judge was of the view that there was substantial compliance with s. 402A(2) of the CPC as the phone numbers of DW2 and DW3 were provided in the notice. The respondent also called one Krishnan a/l Raja Gopal ('DW4') to provide expert witness about IP spoofing and e-mail spoofing. At the close of the defence case, the Sessions Court Judge found that the defence had raised a reasonable doubt on the prosecution's case and acquitted and discharged him on all three charges. Hence, this appeal by the prosecution. The prosecution raised the following issues, *ie,* (i) whether DW4 could be regarded as an expert witness within the meaning of s. 45 of the Evidence Act 1950; and (ii) whether the Sessions Court Judge had erred in her findings.

Held (convicting and sentencing the respondent; setting aside decision of Sessions Court):

(1) There was nothing in s. 402A of the CPC that mandated the service of a fresh notice of alibi after the hearing was adjourned if the actual hearing had yet to commence. The commencement of the trial meant the commencement of the actual trial and not the date when the accused was first charged in court. The service of the notice of alibi on the appellant on 6 November 2009 was well before the date of the commencement of the trial and would therefore be in compliance with s. 402A(1) of the CPC. (para 11)

(2) Substantial compliance with s. 402A(2) of the CPC was insufficient for the purpose of determining whether there had been compliance with that subsection. The requirements of the pre-trial notice under s. 402A must be strictly complied with. By not stating the place where the respondent and his witnesses were supposed to be at the time of the commission of the offence and the addresses of the said witnesses, the respondent had failed to comply with the strict requirements of s. 402A. As such, the respondent's notice of alibi was defective and excluded. Thus, the evidence of the respondent was a bare denial. (paras 17 & 18)

(3) There was no evidence led with regards to DW4's professional qualifications especially in the field of computer forensics. The mere statement that DW4 had experience in the field of information security and computer forensics and had been active with the Cyber Terrorism Unit of Interpol was insufficient to establish the status of an expert. DW4's opinion was based on his experience without carrying out any analysis on the exhibit server. The court found it difficult to believe DW4 in the absence of proof of relevant professional qualifications and experience. (paras 33 & 34)

(4) The Sessions Court Judge erred when she accepted the alibi notice and DW4's expert evidence. Such error had an impact on the final decision when the Sessions Court acquitted and discharged the respondent. The court found that the appellant had proved its case beyond reasonable doubt and sentenced the respondent to a fine of RM10,000 in respect of each charge, and in default to six months' imprisonment. (paras 37 & 41)

Case(s) referred to:
Davendar Singh Sher Singh v. PP [2012] 1 LNS 261 CA ***(refd)***
PP lwn. Kandasamy Muniandy [2005] 2 CLJ 201 HC ***(refd)***
PP v. Lim Chen Len [1981] 1 LNS 11 HC ***(refd)***
PP v. Lin Lian Chen [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 HC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(foll)***

Legislation referred to:
Communications and Multimedia Act 1998, s. 233(1)(a), (3)
Criminal Procedure Code, ss. 294, 402A(1), (2)
Evidence Act 1950, s. 45

For the appellant - Diar Isda Yasmin; DPP
For the respondent - K Periasamy; M/s Periasamy & Co

Reported by Sandra Gabriel

JUDGMENT

Amelia Tee Abdullah J:

[1] The respondent, Muslim bin Ahmad, was charged before the Sessions Court at Kuala Lumpur for three offences under s. 233(1)(a) of the Communications and Multimedia Act 1998 for posting offensive comments on the Perak State government official

portal on 7 February 2009 and 8 February 2009. The three charges were amended twice. The final charges against the respondent read as follows:

Pertuduhan Pindaan Pertama (Pindaan)

Bahawa kamu pada 7 Februari 2009 jam lebih kurang 2.21 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protokol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "damn your sultan" di Portal Rasmi Kerajaan Negeri Perak iaitu http:// www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1) (a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

Pertuduhan Pindaan Kedua (Pindaan)

Bahawa kamu pada 7 Februari 2009 jam lebih kurang 2.27 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protokol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "your sultan kantoi" di Portal Rasmi Kerajaan Negeri Perak iaitu http:// www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1)(a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

Pertuduhan Pindaan Ketiga (Pindaan)

Bahawa kamu pada 8 Februari 2009 jam lebih kurang 4.39 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protokol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "what's the kantoi with your sultan" di Portal Rasmi Kerajaan Negeri Perak iaitu http://www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1) (a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

[2] At the close of the prosecution case, the learned Sessions Court Judge had acquitted and discharged the defendant on all three charges without calling for his defence. Upon appeal by the

Public Prosecutor, the decision was reversed and the High Court had directed that the defence be called in respect of all the charges.

The Respondent's Defence

[3] The respondent's defence was that he did not post the offensive comments. He denied using his computer to send the offensive comments. In his defence, he testified that he was at his factory in Batu Caves on 7 February 2009 and 8 February 2009 and that it was usual for him to go to work on weekends since the factory belonged to him. In support of his defence, he called DW2, Mohd. Hisyam bin Nor, and DW3, Mohd. Shahrom bin Mohd Rosly, both employees at his factory, to confirm that he had gone to work during that weekend.

[4] The respondent had also called one Krishnan a/l Raja Gopal (DW4) as his expert witness. He talked about IP spoofing and e-mail spoofing and demonstrated how IP spoofing is done. Based on his examination of the report P20, he was of the view that the evidence was insufficient to determine who posted the offensive comments. It is worth noting that DW4 came to his conclusions without actually examining any exhibits or the server.

[5] At the close of the defence case, the Sessions Court Judge found that the defence had raised a reasonable doubt on the prosecution case and acquitted and discharged him on all three charges. The Public Prosecutor, being dissatisfied with the aforesaid decision, has lodged an appeal against the said decision.

The Broad Grounds Of Appeal

[6] From the petition of appeal, it can be seen that the appellant has raised five broad grounds of appeal, namely:

i. That the respondent's alibi defence was in breach of s. 402A of the Criminal Procedure Code;

ii. That the respondent's defence was but a bare denial and not to be believed;

iii. That the respondent's defence is an afterthought;

iv. DW2 and DW3 were interested witnesses and not to be believed; and

A v. The evidence of DW4, the respondent's expert witness, should be disregarded.

The court will deal with each of these broad grounds in turn.

The Notice Of Alibi – Section 402A Of The CPC

B

[7] The appellant submits that the respondent's alibi defence had not complied with s. 402A of the Criminal Procedure Code. According to the appellant, the respondent had on 6 November 2009 served them with a notice of alibi dated 28 October 2009. C This was three days before the commencement of the hearing which was initially scheduled from 9 to 13 November 2009. From the grounds of decision of the learned Sessions Court Judge, the prosecution had informed the court that that they had just been served with the alibi notice and had not had time to verify the D particulars and information given in the notice. The court had then adjourned the hearing of the case to 14 to 25 June 2010.

[8] The appellant contends that the notice of alibi was invalid because:

E

i. No fresh notice was served by the respondent before the hearing commenced on 14 to 25 June 2010;

ii. The notice of alibi was defective as there was non-compliance with s. 402A(2).

F

[9] Section 402A of the Criminal Procedure Code reads as follows:

> 402A (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it shall not be G admitted unless the accused shall have given notice in writing of it to the Public prosecutor at least ten days before the commencement of the trial.
>
> (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at H the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[10] The notice of alibi does not appear to have been marked as I an exhibit. It has not been included in the appeal record and is therefore not before the court. However, both parties as well as the learned Sessions Court Judge had referred to it and its existence is therefore not in doubt.

[11] On the issue of whether the respondent is required to serve a fresh notice of alibi after the hearing was adjourned from 9 to 13 November 2009 to 14 to 25 of June 2010, the court is of the view that there is nothing in s. 402A of the Criminal Procedure Code which mandates the service of a fresh notice of alibi after the hearing of the case is adjourned if the actual hearing has yet to commence. Reference is made to the case of *PP v. Lim Chen Len* [1981] 1 LNS 11; [1981] 2 MLJ 41 where His Lordship, Mohamed Azmi J (as His Lordship then was) held that the words "commencement of the trial" meant the commencement of the actual trial and not the date when the accused was first charged in court. It follows there from that that the date of commencement of the trial would not be 9 November 2009, the initial date scheduled for the commencement of the hearing, but 14 June 2010 when the trial actually started. The court finds that the service of the notice of alibi on the appellant on 6 November 2009 was well before the date of the commencement of the trial and would therefore be in compliance with the time requirement for service of the notice as set out in s. 402A(1).

[12] However, it must be noted that s. 402A contains a subsection (2) which requires the notice under subsection (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence as well as the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. It is trite that the provisions of s. 402A are evidential and not merely procedural and that the failure to comply with the provision would render any alibi evidence adduced to be inadmissible.

[13] In the case of *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166, the Supreme Court in dealing with the issue of alibi notice under s. 402A of the Criminal Procedure Code had held as follows:

> There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with – **strictly**. (emphasis added)

[14] In our present appeal, the appellant's complaint is that the respondent's notice of alibi was not in compliance with s. 402A(2) of the CPC in that the notice had only stated that the respondent was together with his employees without stating the

A place where they were at. Further, the addresses of the witnesses were not stated in the said notice. The court finds this fact to be undisputed where the learned Sessions Court Judge had stated that "It is not in dispute that the notice of alibi served on the prosecution merely mentioned that the defendant was with his B employees and disclosed their names and handphone numbers."

[15] The court notes that this assertion of non-compliance with s. 402A(2) of the Criminal Procedure Code was never responded to at all by the respondent in his submissions which had only C dealt with the issue of whether a second notice of alibi had to be served on the appellant.

[16] In her grounds of decision, the learned Sessions Court Judge had agreed that the notice of alibi in the present case "did not state with clarity and precisely the particulars stated in D subsection (2)". However, she was of the view that there was "substantial compliance" as the phone numbers of DW2 and DW3 were given in the notice. She went on to say that "It would be reasonable and safe to infer that the defendant must have given a statement to the police that he was at the factory in view E of the fact that the prosecution did not apply to impeach his credit when he alleged this in court."

[17] In respect of this issue, the court finds that "substantial compliance" with s. 402A(2) of the Criminal Procedure Code is F insufficient for the purposes of determining whether there has been compliance with that subsection. Following the Supreme Court decision in *Vasan Singh v. Public Prosecutor (supra)*, which decision this court is bound to follow, the requirements of the pre-trial notice under s. 402A must be strictly complied with. The court G finds that by not stating the place where the respondent and his witnesses were supposed to be at the time of the commission of the offence, and the addresses of the said witnesses, the respondent had failed to comply with the strict requirements of s. 402A. As such, the court finds that the respondent's notice of H alibi, with its several deficiencies, to be defective.

[18] And what are the consequences of a defective notice of alibi? It is trite law that where no notice of alibi under s. 402A of the Criminal Procedure Code is given or where the notice given is I defective for failure to comply strictly with the said provision, any evidence in support of the alibi must be excluded from the consideration of the defence evidence. In such a situation, the court has no discretion to waive the requirement of a pre-trial

notice. In this case the court finds that the learned Sessions Court Judge was clearly in error when he accepted the notice of alibi as being in "substantial compliance" of the provisions of s. 402A of the Criminal Procedure Code.

Are DW2 And DW3 Interested Witnesses And Not To Be Believed?

[19] In light of the court's finding as regards the respondent's notice of alibi as being defective and to be excluded from the consideration of the court, it would be expedient now to deal with the 4th broad ground as regards the evidence of DW2 and DW4 and whether they are interested witnesses and not to be believed.

[20] DW2, Mohd. Hisyam bin Nor, is a welder working in Ultimate Engineering Sdn Bhd, the respondent's company, since 2000. DW 3, Mohd. Shahrom bin Mohd Rosly, has been a QC Supervisor with the respondent's company since 2003. At p. 141 of the appeal records, the court notes the following evidence from DW2:

> En. Muslim ada beri bantuan kepada saya iaitu kemudahan kerja. Buat masa sekarang saya ada tolong dia. Jika dia susah saya akan tolong. **Apa-apa sahaja bantuan yang diminta saya akan tolong.** (emphasis added)

[21] And at p. 145 of the appeal records, the court notes the following evidence from DW3:

> Hubungan saya dan Majikan adalan sangat rapat. Majikan selalu membantu saya jika saya dalam kesusahan. Majikan adalah seorang yang bertanggungjawab dan menjaga kebajikan pekerja-pekerja.
>
> **Jika majikan ada meminta bantuan, saya sanggup memberi bantuan yang dimaksudkan.** (emphasis added)

[22] From the above evidence of DW2 and DW3, the court is of the view that these two witnesses cannot be regarded as disinterested witnesses. It is not just the fact that they are employees of the respondent, but rather their clear and professed willingness to render the respondent whatever assistance necessary that makes the court cautious in viewing their evidence. Be that as it may, in light of the court's finding that the notice of alibi

served by the respondent was defective and that any alibi evidence adduced should be disregarded, the issue about the value of the alibi evidence of DW2 and DW3 becomes moot.

[23] As such, on this issue, the court finds that in respect of the evidence of DW2 and DW3, their evidence insofar as they amount to alibi evidence for the respondent will not be considered by the court. DW2's evidence to the effect that on 7 February 2009 and 8 February 2009 (a Saturday and a Sunday) he had worked the whole of those two days and that he saw that the respondent was in the office should not be considered. DW3's evidence is more ambivalent. In the final analysis, taking into account the entirety of DW3's evidence, he was not able to say if the respondent had come to work on 7 February 2009 and 8 February 2009.

Whether The Respondent's Evidence Is A Bare Denial And An Afterthought?

[24] The court notes that with the exclusion of the alibi defence from the testimony of the respondent, the evidence of the respondent becomes in effect a bare denial. The court has carefully perused the testimony of the respondent appearing in the appeal records. He admitted that he had a computer at home and had known how to use the Internet since 1999. He admitted surfing the Internet for his business. He claimed that he had gone into the PM's website but that was only to request for assistance. However during cross-examination, he admitted that he had visited the PM's website and had posted comments on the said website.

[25] According to the respondent, he works every weekend. He would usually arrive at the office at 8.30am and work until 4pm and sometimes even into the night. The court notes his initial evidence that:

> Pada 7 dan 8/2/2009 **saya tidak ingat** bila tapi Saturday dan Sunday biasanya saya bekerja di office.

which evidence would show that the respondent did not in fact remember about the two dates in question. However, he admitted that he could leave the office at any time as "saya bekerja sendiri dan ia adalah company saya." The journey from his home to his office takes about 15 minutes.

[26] The respondent denied posting the offensive comments at http://www.perak.gov.my. Whilst he agreed that there were Saturdays and Sundays in 2009 when he did not work, however he denied that he did not work on 7 February 2009 and 8 February 2009.

[27] This then is the sum total of the respondent's testimony.

[28] His wife, Aziah binti Mohd Khalid (PW5), is a technician with Jabatan Penyiaran. She testified that on 7 February 2009 and 8 February 2009, she was on shift duty and had gone to work. According to her, she should work until 5pm but on weekends was allowed to leave early, usually at about 4pm. On 7 February 2009 and 8 February 2009, her daughter Qhadijah had borrowed her car and as such she had to be sent to and fetched from work by her husband, the respondent. Before leaving the office she would call him and he would be waiting when she was ready to leave the office. It takes between 30 to 45 minutes from the house to Angkasapuri.

[29] Usually, the respondent would invite her to have a drink first before going home. On 7 February 2009 and 8 February 2009, they had gone for a drink before going home and, as such, had gone home late. She could not recall the shop where they had the drinks.

[30] The court notes that although his wife had suggested that the respondent had picked her up from her office at Angkasapuri and that they had gone from drinks, the respondent himself had NOT testified that he had fetched his wife from work on the material dates. As the Court has stated earlier, the respondent's defence is but a bare denial. And, as held by Yusioff Mohamed J in *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324, "A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient".

The Evidence Of DW4, The Respondent's Expert Witness

[31] The final broad ground of appeal raised by the appellant relates to the evidence of DW4, the respondent's expert witness. The appellant raises the query as to whether Krishnan a/l Rajagopal (DW4) can be regarded as an expert within the meaning of s. 45 of the Evidence Act 1950. The appellant submits that DW4 was held out to be an expert witness without the

A respondent first establishing his expertise. In the case of *PP v. Lin Lian Chen* [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746; [1991] 1 MLJ 316, His Lordship Mokhtar Abdullah J (as His Lordship then was) found that the prosecution had failed to prove a *prima facie* case based on *inter alia* the failure to prove the expertise of
B the chemist. And at p. 747 (CLJ); p. 317 (MLJ), His Lordship had this to say:

> The prosecution had elected to call Mr. Primulapathi Jaya, the government chemist (PW2) to give expert opinion that the drug
C examined by him (and which formed the subject matter of the charge) was heroin.
>
> All that the prosecution had adduced to show that PW2 was an expert was PW2's testimony, as follows:
>
> D > I have been with the Chemistry Department for 13 years. I have a BSc (Hons) degree majoring in Chemistry. I have done a Diploma in Blood Seriology.
>
> That is all. Apart from the fact that PW2 was a graduate in Chemistry with 13 years experience in the Chemistry Department,
E no evidence was led at all by the learned deputy public prosecutor that this witness had the necessary experience or the experience in the analysis of dangerous drugs, especially heroin, or for that matter, had given evidence in court on the analysis of drugs, especially heroin, or that his expert testimony had been accepted by the court. Therefore, had the prosecution in this particular case
F proved PW2 to be an expert whose opinion and finding could be considered and accepted by the court? Strictly speaking, the prosecution had failed in law to provide the basis for the reception of the expert opinion of PW2 under s. 45 of the Evidence Act 1950.
>
G The learned deputy public prosecutor was either unaware or unmindful of the salutary advice of Hashim J in *Wong Chop Saow v. PP*:
>
> H > May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He shall then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts.
>
I It is only after these basic steps have been established that the expert witness then proceeds to describe the subject matter examined by him and accordingly gives his opinion based on such examination.

[32] The court has carefully perused the appeal records and the evidence of DW4. As can be seen at p. 148 of the appeal records, all that DW4 has stated as regards his alleged expertise is as follows:

> Basically what I do is that I'm an expert witness in the field of Information Security and Computer Forensics.
>
> I started in 1998 but officially and actively in 2000 in Cyber Terrorism Unit of Interpol. I've been in this field 11 years.
>
> My experience covers 5 continents and across 30 countries. Some of the countries in which I constantly train and handhold are Kingdom of Saudi Arabia, Irish Guardia, Nigeria, Ghana, Policia Federal in Mexico and etc.

[33] During cross-examination, DW4 had admitted at p. 156 of the appeal records that he had never given evidence in court before although he claimed that he had "buat domestic inquiry" and forensic investigations in Malaysia. He had also confirmed that his opinion in court was based on his experience without carrying out any analysis on the exhibit and server.

[34] In the case of *Public Prosecutor v. Lin Lian Chen (supra)*, the High Court had found that merely stating that he had a BSc (Hons) degree majoring in chemistry, a Diploma in Blood Seriology and 13 years of working experience with the chemistry department was insufficient to establish the chemist with the status of an expert. In our present case, far less has been established from DW4. The court agrees that no evidence has been led as regards DW4's professional qualifications, if any, especially in the field of computer forensics. The court is of the considered view that merely stating that he is an expert in the field of Information Security and Computer Forensics and has been actively with the Cyber Terrorism Unit of Interpol, allegedly since 2000, without more, is insufficient to establish his experience. Further, the court expresses more than a little scepticism as regards this evidence. From the appeal records, DW4 was 32 years of age in 2011. If he had been with the Cyber Terrorism Unit of Interpol since the year 2000, this would mean that he had been actively with Interpol since the age of 21 years. The court finds this extremely difficult to believe in the absence of proof of relevant professional qualifications and experience.

[35] The court further notes that DW4 had admittedly not carried out any analysis of the exhibits and server in this case. In effect, DW 4's evidence was in fact based on his study of PW9's case report (P20). The court is of the considered view that apart from merely saying that e-mail spoofing can be done and showing how it could be done, no proof has been advanced by DW4 to show that e-mail spoofing had in fact taken place in this particular case. As such, on this issue, based on the evidence and decided authorities, the court is constrained to disregard the evidence of DW4.

Conclusion

[36] The court is fully aware that a High Court hearing an appeal is generally reluctant to disturb a finding of fact by the trial judge as the trial judge would have had the advantage to seeing and hearing the witnesses first hand. However, there are circumstances where it would still be proper for the court to do so. In the Court of Appeal case of *Davendar Singh Sher Singh v. PP* [2012] 1 LNS 261; [2012] 3 AMR 489, His Lordship Azahar Mohamed JCA held that:

> ... it would be open to us to upset the findings made by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself.

[37] In this case, the learned Sessions Court Judge was clearly in error when she accepted the respondent's alibi notice as having complied with s. 402A of the Criminal Procedure Code and accepted the alibi defence. She was also in error when she accepted DW4 as an expert witness and relied on his alleged expert evidence. Such errors would directly impact on the final decision arrived at by the learned Sessions Court Judge in acquitting and discharging the respondent on all the charges. Then decision of the learned Sessions Court Judge was clearly against the weight of the admissible evidence adduced.

[38] Based on the court's findings as stated above, the learned Sessions Court's decision to acquit and discharge the respondent on all three charges was clearly in error as the respondent had not cast any reasonable doubt on the appellant's case. The court finds

that the appellant had proved its case beyond reasonable doubt. The court would therefore set aside the order of acquittal and discharge and substitute it with a finding of guilt and conviction on all three charges.

[39] In mitigation, learned counsel for the respondent told the court that the respondent was 55 years old at the time of the offence. He had no previous convictions. As a businessman, a term of imprisonment would have an adverse effect on his business. In urging the court for a binding over under s. 294 of the Criminal Procedure Code, learned counsel cited the case of *PP v. Kandasamy Muniandy* [2005] 2 CLJ 201; [2005] 4 AMR 169. On the contrary, the learned Deputy Public Prosecutor submitted that the offences committed by the respondent were serious offences as the offensive comments were made against the Sultan of Perak and she urged the court to impose a custodial sentence.

[40] The court is of the view that s. 294 of the Criminal Procedure Code has no place in offences of this nature. A binding over order would send the wrong message to would be offenders and the public at large that offensively uncontrolled and virulent comments can be indiscriminately posted on the Internet without any or serious repercussions. And that is not a message that this court would like to send out.

[41] An offence under s. 233(1)(a) of the Communications and Multimedia Act 1998 is punishable under s. 233(3) with a fine of not exceeding fifty thousand ringgit or imprisonment for a term not exceeding one year or to both. The court imposed a sentence of a fine of RM10,000 in respect of each charge, and in default of each fine, to six months' imprisonment which it views as fit and proper in all the circumstances of this case.